

**MINUTES
DECEMBER 2, 2005**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:17 a.m., on Friday, December 2, 2005, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Heidi Kaiser, Robin Shropshire, Bill Rossbach, Gayle SkunkCap and Don Marble

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Liaison Present: Tom Livers, DEQ Deputy Director

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Richard Oppen, Director; John North, Chief Legal Counsel; Jim Madden, Legal; Claudia Massman, Legal; Keith Christie, Legal; David Rusoff, Legal; John Arrigo, Enforcement Division (ENF); Ed Coleman, ENF; Frank Gessaman, ENF; Dan Kenney, ENF; Steve Welch, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Air Resources Management Bureau (ARMB), PCD; Vickie Walsh, ARMB, PCD; David Klemp, ARMB, PCD; Eric Merchant, ARMB, PCD; Julie Merkel, ARMB, PCD; Debbie Skibicki, ARMB, PCD; Charles Homer, ARMB, PCD; Jan Brown, ARMB, PCD; Ron Lowney, ARMB, PCD; Bonnie Lovelace, Water Protection Bureau, PCD; Ed Thamke, Waste & Underground Tank Management Bureau, PCD; Neil Harrington, Industrial & Energy Minerals Bureau, PCD; Art Compton, Planning, Prevention & Assistance Division (PPAD); George Mathieus, Water Quality Planning Bureau (WQPB), PPAD; Christian Levine, WQPB, PPAD; Bob Bukantis, WQPB, PPAD.

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Anne Hedges, Montana Environmental Information Center; Don Quander (various companies); Dave Galt, Montana Petroleum Association; Bud Clinch, Montana Coal Council; Don Allen, Western Environmental Trade Association; Dustin Stewart, Montana Mining Association.

Chairman Russell welcomed new Board member Heidi Kaiser.

I.A. Review and approve minutes of September 30, 2005, meeting.

Chairman Russell called for a motion to approve the minutes of the September 30 Board meeting. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

I.B. Set 2006 meeting schedule; budget information.

Mr. Livers said he had heard concern with the proposed July 28 Board meeting date, and that DEQ would propose to move that date to July 21.

Chairman Russell called for a motion to adopt the schedule with the July 21 date. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Livers provided a brief overview of the Board's budget.

II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.

Ms. Orr had nothing to add beyond the information provided in the agenda.

II.A.1.b In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.

Ms. Orr had nothing to add beyond the information provided in the agenda.

II.A.1.c In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater treatment Plant, BER 2004-15 WQ.

Ms. Orr said there had been a request for an extension in which to finalize the details of the settlement agreement. She said she had issued an order giving the parties until January 17 to do that.

II.A.1.d In the matter of violations of the Montana Water Quality Act by Bar S Livestock, Inc., Toole County, BER 2005-06 WQ.

Ms. Orr had nothing further to add beyond the information provided in the agenda.

II.A.1.e In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.

Ms. Orr said that the Department had notified her that it was filing a notice of automatic stay that ASARCO filed, and that it believes this contested case hearing should be stayed until further notice.

II.A.1.f | In the matter of violations of the Montana Operator Certification and Public Water Supply Laws by Richard Kelly at the Ten Mile-Pleasant Valley Lagoons, Lewis & Clark County, BER 2005-13 PWS.

Ms. Orr had no further information to relay beyond the information provided in the agenda.

II.A.1.g | In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.

Ms. Orr had nothing further to add regarding this case.

II.B.1 | TMDL Update

Mr. Mathieus explained that TMDL stands for Total Maximum Daily Load -- the amount of pollutants a water body can receive from point, nonpoint and natural sources and still meet its water quality standards. He said it's a watershed based plan -- a systematic approach to assessing the water quality and determining if there's a problem, then developing and implementing solutions and with that comes monitoring.

Mr. Mathieus said Montana's TMDL Program is unique due to the geographic nature of the state and the diversity of both land ownership and land management activities across the state. He said the DEQ has developed a two-phased approach, the first phase being building the necessary tools, completing the reassessments and speeding up the pace of TMDL development so that when phase two is reached, the reassessments will be completed and they will have the necessary tools to complete the TMDL process and can focus on TMDL development. He said with this plan they could achieve the 2012 schedule and that the program is currently on track to achieve both the consent decree and the court order.

Mr. Mathieus also provided a brief overview on the nutrient criteria currently being developed. He responded to Board questions regarding Flathead Lake, Lake Helena and other water bodies.

III.A.1 | In the matter of final action regarding the amendment of ARM 17.8.759 pertaining to review of permit applications and extending public comment periods.

Mr. Homer said a hearing was held October 3 on this rule regarding implementation of House Bill 581. He said public comments were received and the Department has prepared a draft notice of adoption that addresses some of those comments. He responded to Board member questions.

Ms. Hedges said she was largely responsible for the bill being introduced in the Legislature and moving through the process and being adopted. She said the changes being made are quite satisfactory and that Department has done a good job.

Mr. Quander said the Legislature intended an extension to be the exception, not the rule as the language describes. He said the Legislature felt there ought to be an exceptional circumstance for the Department to extend the comment period.

Chairman Russell called for a motion to adopt the amendments, accept the hearing examiner's report, the 521 and 311 analyses and the comments and responses to comments. Mr. Rossbach so MOVED. Mr. SkunkCap SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.2 In the matter of final action regarding the amendment of ARM 17.8.743 and the adoption of New Rules I through VI pertaining to air quality permit applications and air emission control requirements for certain oil or gas well facilities.

Mr. Homer said a hearing was held October 4 and comments were received from the public. He said the Department has prepared a draft notice of final adoption addressing those comments.

Mr. Galt urged the Board to adopt the rules.

Ms. Shropshire inquired about the impacts of the rules.

Chairman Russell called for a motion to adopt the amendments with the change, the hearing examiner's report, the 521 and 311 analyses, and the comments and responses to comments. Mr. Rossbach so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 In the matter of the request for initiation of rulemaking to update rules adopted under the Metal Mine Reclamation Act (ARM 17.24.101) and the Strip and Underground Mine Reclamation Act (ARM 17.24.301), House Bill 428 and 429 enacted by the 2005 Montana Legislature.

Mr. Arrigo said the old system for assessing a penalty for violations of these reclamation laws involved a two to three step process. He said the purpose of House Bill 428 was to streamline the enforcement process and that under the new reclamation laws, they would only need to issue a notice of violation and order – one document.

Mr. Arrigo said that House Bill 429 affected how the penalty is calculated, standardizing the factors that must be considered when a penalty is calculated. He said these rules had been discussed with various advisory committees and work groups and the rules had been modified based on comments received from the committees and work groups. He also provided an overview of the rule notice and how the penalties are calculated.

Mr. Arrigo responded to questions of the Board.

Ms. Hedges spoke in favor of moving forward to initiate the rulemaking and that MEIC's concerns could be addressed during the rulemaking process.

Mr. Clinch said that the Montana Coal Council has anxiety about how these rules will be interpreted and what that will mean in terms of penalties, but that they will be submitting comments to help clarify some of the terms.

Mr. Allen said WETA looks forward to working with the Department to further refine the rules.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Ms. Orr as the presiding officer. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.2 In the matter of the request for initiation of rulemaking to amend ARM 17.8.504, 17.8.505 and 17.8.744 and to adopt New Rules I through IX to establish a registration system for certain facilities that presently require an air quality permit.

Mr. Homer explained that House Bill 700, adopted in the 2003 Legislature, allowed the air program to implement a system of registration in lieu of permitting for traditional oil and gas well facilities. He said this would not result in a reduction in requirements or an increase in emissions, but in a different administrative process. He said the reason DEQ is proposing this for the specific source category is that the Department expects to get between 1,000 and 2,000 oil and gas well permit applications around January 3, 2006. This compares to a typical year of fewer than 200 permit applications in this category.

Ms. Walsh provided an overview of the proposed registration rule. She said registration would have the same requirements as a permit. She explained how concerns with drilling sour gas were handled.

Mr. Homer said the department requests that the Board initiate rulemaking and assign a hearings examiner. He said comment would also have to be taken at the hearing on this rule for inclusion in the State Implementation Plan. He then responded to Board member questions.

Mr. Galt said the Montana Petroleum Association lends its support to the promulgation of these rules.

Mr. Quander joined Mr. Galt in supporting the initiation of these rules.

Ms. Orr confirmed her availability to preside over the rulemaking and said a tentative hearing date of January 23, 2006, has been discussed.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Ms. Orr presiding officer. Mr. Marble so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.3 In the matter of the request for initiation of rulemaking to amend ARM Title 17, Chapter 8, Subchapters 8 and 9 to adopt federal reforms to the New Source Review permitting regulations as set forth in 40 CFR 51.165 and 40 CFR 51.166.

Mr. Homer said this rulemaking was to adopt the new source review reform promulgated by the EPA. He said the reform measures would only apply to modifications of existing sources. He said if the changes did not occur to the rules by the January deadline, the EPA could determine that DEQ's program is inadequate and take it back, at least until such time as the program is revised, which would cause these sources to have to obtain permits from both the EPA and the DEQ.

Mr. Merchant explained that new source review is the Department's air permitting program regulating the largest sources of emissions in the state, providing additional review above and beyond its minor source air quality permitting program. He said there are two programs within the new source review: the prevention of significant deterioration program and the non-attainment program.

Mr. Merchant explained EPA's rationale for changing the new source review – a disincentive for sources to make changes such as updating technologies. He provided further details about the rule changes.

Mr. Homer said comments had been received the previous day and the Department had not had a chance to review those thoroughly, but that it believes the comments can be addressed during the public comment period and the hearing. He requested that the Board initiate the rulemaking and appoint a hearings examiner. He responded to Board member questions.

Mr. Quander said that, on behalf of Stillwater Mining Company, Exxon Mobil, Holcim, Inc., and Smurfitt Stone, he urged the Board to initiate the rulemaking.

Ms. Hedges said MEIC received the language only a few weeks ago and it took a while to respond to it. She provided a brief history of her view of New Source Review. She urged the Board to request that the Department provide further analysis on worst case scenarios before proceeding with the rulemaking.

Mr. Rossbach MOVED that the Board postpone a decision on this rulemaking until at least the next meeting, with a request that the Department provide additional information about some of the on-the-ground impacts and questions that have been raised by some of the commentaries. Ms. Shropshire SECONDED the motion.

Further discussion took place. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

III.C.1 In the matter of final action on violations of the Opencut Mining Act by Kenneth Mikesell, d/b/a Mikesell Gravel Mines, Meagher County, BER 2005-10 OC.

Ms. Orr said the parties in this case had submitted a stipulation for dismissal on October 20 and that order provides for dismissal with prejudice.

Chairman Russell called for a motion to accept the order of dismissal as prepared and to authorize the Board Chair to sign it. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.2 | In the matter of final action regarding the notice of violation of the Opencut Mining Act by Mickelson Rock Products, LLC, at the Tricon Pit #3, Mineral County, BER 2005-12 OC.
- Ms. Orr said the order of dismissal incorporates the Administrative Order on Consent.
- Chairman Russell called for a motion to accept the order and to authorize the Board Chair to sign it. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.3 | In the matter of final action regarding violations of the Montana Public Water Supply laws by Darwin Simac, d/b/a Jackson Creek Saloon, Jefferson County, BER 2005-05 PWS.
- Ms. Orr said the decision of the Board is to decide whether to accept her Findings of Fact, Conclusions of Law and proposed Order, which proposes a penalty of \$1,728.25. She said that, under MAPA, there is an opportunity for the Respondent to comment on the Findings of Fact document. She said the respondent received the document a week ago and has not commented and is not here today.
- Discussion took place among the Board. Chairman Russell called for a motion to accept the Findings of Fact, Conclusions of Law and Order and to authorize the Board Chair to sign the order. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.4 | In the matter of final action regarding the denial of the approval of subdivision plans of Sunnyside Orchards #1, Block 6, Lots 29, 30 and 31, Ravalli County, BER 2005-15 SUB.
- Ms. Orr said there was a settlement in this case and the Board had an order to approve.
- Chairman Russell called for a motion to accept the order and to authorize the Board Chair to sign it. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- Mr. Marble requested that, in the future, the Department make it clear to the Board what the agreed fine was in settlement cases.
- III.D.1 | In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding a notice of violation and statement of proposed penalty.
- Chairman Russell called for a motion to appoint Ms. Orr permanent hearings examiner for the case. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.2 | In the matter of the appeal by the Town of Ennis, BER 2005-18 WQ, regarding MPDES Permit No. MT0030732.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearings examiner for this case. Ms. Kaiser so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.3 | In the matter of the appeal by Westmoreland Resources, Inc., BER 2005-19 SM, appealing the issuance of a notice of violation and statement of proposed penalty.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearings examiner for this case. Mr. Marble so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV. | General Public Comment

Chairman Russell called for general public comment.

Mr. Stewart requested that the Board issue an amended notice on the proposed amendments to rules ARM 17.24.116 in regard to the Metal Mine Reclamation Act, to extend the public comment period.

Chairman Russell directed the Department to notice this issue to be taken up during the hearings in Boulder and Fort Belknap.

V. | Adjournment

Chairman Russell called for a motion to adjourn. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 1:19 p.m.

Board of Environmental Review December 2, 2005, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE